

JURY TRIAL -- PEREMPTORY CHALLENGES -- Peremptory challenges -- *State v. Paleo* -- Nonuse of peremptory challenges may be found to be discriminatory Revised 8/2001

The Court of Appeals has just held that *Batson's* prohibition against purposeful racial or sex discrimination in the use of peremptory strikes in jury selection applies to the prosecutor's election *not* to use all of his peremptory strikes. In *State v. Paleo*, ____ Ariz. ____, 5 P.3d 276 (App. 2000), the prospective jury panel included only two Hispanic people, M.R. and M.E. The prosecutor used only four of his six peremptory challenges, using one to remove M.R. from the panel . Defense counsel used all six of his peremptory challenges, leaving more people in the venire than necessary to complete the jury panel with alternates. Accordingly, the clerk struck the excess people from the bottom of the list as required by Rule 18.5(g), Ariz. R. Crim. P.2 Because the only remaining Hispanic was at the bottom of the list, the prosecutor's decision not to use all of his peremptory strikes "automatically eliminated venire person M.E., the only remaining Hispanic." *Id.* at ¶ 3. Defense counsel objected to both Hispanics being excluded.

The trial judge required the prosecutor to provide a race-neutral reason for his actions. The prosecutor explained why he struck M.R. and the court held that the reason was indeed race-neutral. "When asked to explain his exclusion of M.E.," *id.* at ¶ 11, the prosecutor responded:

"I was done striking my individuals. I had two left over, and she [M.E.] happened to fall in that order, just as she had been called. So I just choose [sic] not to use my other strikes."

Id. The trial court found *Batson* did not apply to M.E., reasoning that the State did not actually strike M.E. and the State is not required to use all of its peremptory strikes. The trial proceeded and Paleo was convicted.

On appeal, Paleo raised a *Batson* challenge. He cited *State v. Scholl*, 154 Ariz. 426, 743 P.2d 406 (App. 1987). In *Scholl* the only minority member in the 24-person venire was number 23. The prosecutor used only four of his six peremptory strikes, resulting in the exclusion of number 23. The defendant claimed that the sole minority member was excluded because the prosecutor failed to use all available peremptory strikes. The prosecutor explained that he did not customarily use all of his strikes unless he had a reason to do so, and that he had no reason to strike the minority member. Although the trial court in *Scholl* found the prosecutor's race-neutral explanation credible, the trial court nevertheless ordered the prosecutor to strike someone else so that the minority venireperson could sit on the jury. The prosecutor declined and the trial court ordered a mistrial. The Court of Appeals in *Scholl* interpreted *Batson* broadly and held, "There is no reason to differentiate between use and nonuse of peremptory challenges in determining whether the State is engaging in purposeful discrimination in its selection of jurors." *Id.* at 429, 743 P.2d at 409. Still, the Court held that the trial court erred in construing *Batson* to require that a minority person be placed on the jury. Paleo cited *Scholl* and argued that the prosecutor's nonuse of his peremptory challenges could be discriminatory.

Relying on *Scholl*, the Court of Appeals reversed Paleo's conviction, finding that "the state's failure to exercise its strikes may well show purposeful discrimination" and "[t]he prosecutor merely let the clerk exercise the prosecutor's strike." *Paleo*, ¶ 11. The

Court stated that the prosecutor's explanation failed to "address the requirement of an affirmative race-neutral reason:"

The prosecutor may not rebut Paleo's argument merely by denying a discriminatory motive. If the prosecutor could do so, the Equal Protection clause would be but a vain and illusory requirement. The prosecutor's conduct here could well lead to the conclusion that the prosecutor contrived to force the clerk to exclude M.E. because of her race as the prosecutor hid behind the challenge waiver.

Id. [citations and internal quotation marks omitted]. The Court of Appeals concluded, "Given that the prosecutor did not initially provide a race-neutral reason, we set aside Paleo's conviction and order a new trial." *Id.* at ¶ 13. Thus, the Court found that a discriminatory motive would be *presumed* when the prosecutor failed to exercise all available peremptory strikes.

Courts employ a three-step analysis to use in determining if a peremptory challenge has been improperly made:

- (1) The party opposing the strike must make a prima facie showing that the strike was made on the basis of race or gender;
- (2) if the requisite showing is made, the burden shifts to the one who made the strike to articulate a race-neutral or gender-neutral explanation for the strike; and
- (3) if the proponent of the strike articulates a race-neutral or gender-neutral reason for the strike, the trial court must decide whether the one who challenges the strike has carried the burden of proving purposeful discrimination.

State v. Henry, 191 Ariz. 283, 85-86, 955 P.2d 39, 41-42 (App. 1997). In *Paleo*, the trial court implicitly found that the defense had made a prima facie showing that the prosecution was acting in a discriminating manner; otherwise the court would not have asked the prosecutor to explain why he did not use all of his peremptory strikes. But the trial judge did not explicitly say that he found the prosecutor's explanation to be race-

neutral, and the Court of Appeals refused to infer such a finding "given the prosecutor's inadequate explanation and the judge's ambiguous wording." *Paleo*, *id.* at ¶12.

No mandate has issued on *Paleo* and the decision is still subject to review by the Arizona Supreme Court. However, it has always been a good idea for the prosecutor to give explicit neutral reasons for using any peremptory strike. In light of *Paleo*, prudent prosecutors will begin giving explicit neutral reasons for *not* using any peremptory strike as well.